Standards of Review

Ross T. Roberts Inn of Court
March 6, 2008

Duane Benton
United States Circuit Judge

§ 206.01 Importance of Standard of Review

F.R.A.P. 28(a)(9)(B) Appellant's brief. "for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)" F.R.A.P. 28.1(c)(2) Cross-Appellant's brief (same).

1993 Advisory Committee note. "The amendment requires an appellant's brief to state the standard of review applicable to each issue on appeal. Five circuits currently require these statements. Experience in those circuits indicates that requiring a statement of the standard of review generally results in arguments that are properly shaped in light of the standard."

F.R.A.P. 28(b)(5) Appellee's brief. "none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;
(2) the statement of the issues;
(3) the statement of the case;
(4) the statement of the facts; and
(5) the statement of the standard of review

F.R.A.P. 28.1 (c)(3)(E) Appellant's Response/Reply brief (same).

§ 206.02 Jury Verdicts Reviewed for Sufficiency of Evidence

[1] Substantial Evidence Rule

[2] Sufficiency of Evidence in Criminal Cases Jackson v. Virginia, 443 U.S. 307, 318-19 (1979): "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask [319] itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby* v. *INS*, 385 U.S. at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana*, 406 U.S. at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution."

[3] Sufficiency of Evidence in Civil Cases Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1337-38 (8th Cir. 1997): " In determining whether there exists sufficient evidence to support the jury verdict, we must view the evidence in the light [1338] most favorable to the prevailing party, remembering that "judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party.'" (*quoting* Keenan v. Computer Assoc. Int'l, Inc., 13 F.3d 1266, 1269 (8th Cir. 1994)).

§ 206.03 Trial Court's Findings of Fact Reviewed for Clear Error

[**1] Source of Rule** F.R.C.P. 52 (a) "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Hernandez v. New York, 500 U.S. 352, 365-66 (1993): "While no comparable rule [to F.R.C.P. 52(a)] exists for federal criminal cases, we have held that the same standard [366] should apply to review of findings in criminal cases on issues other than guilt." (my brackets)

[2] Clearly Erroneous Review

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985): "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co*., 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo." Zenith Radio Corp*. v. *Hazeltine Research, Inc*., 395 U.S. 100, 123 (1969). If the [574] district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

[3] Rationale for Deference to Trial Court

[4] Plausible Finding Cannot Be Error

[5] Basis of Trial Court's Findings

[6] Absent or Inadequate Findings

[7] Clear Error

§ 206.04 Conclusions of Law Reviewed Independently

[1] De Novo Review Salve Regina College v. Russell, 499 U.S. 225, 231 (1991)

[2] Rationale for De Novo Review

[3] Review of Mixed Questions of Law and Fact

[a] Standard of Review Unsettled by Supreme Court

[b] Circuits Differ on Standard of Review

Americans United v. Prison Fellowship Ministries, 509 F.3d 406, 413 (2007): "After a bench trial, this court reviews *de novo* legal conclusions and mixed questions of law and fact."

Sargent v. Commissioner**,** 929 F.2d 1252, 1254 (8th Cir. 1991): "Mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewable de novo. " *citing*

United States v. McConney, 728 F.2d 1195, 1204 (9th Cir. 1982) (en banc):

“Thus, because the application of law to fact will generally require the consideration of legal principles, the concerns of judicial administration will usually favor the appellate court, and most mixed questions will be reviewed independently. This is particularly true when the mixed question involves constitutional rights. But we identify from existing precedent at least two exceptions to this general rule: mixed questions in which the applicable legal standard provides for a strictly factual test and the mixed question of negligence.

In summary, to classify mixed questions of law and fact for standard of review purposes, we adopt a functional analysis that focuses on the nature of the inquiry required when we apply the relevant rule of law to the facts as established. The analysis is not a precise one and does not offer any litmus test by which all mixed questions can be neatly categorized. It does not "unerringly distinguish between findings of fact and conclusions of law." *Pullman-Standard v. Swint*, 456 U.S. at 289 n.19. Nonetheless, we think that if we focus on the nature of the inquiry required in determining whether the established facts fall within the relevant legal definition, we employ a neutral test that accurately reflects the concerns that properly underlie standard of review jurisprudence.”

[c] Deferential Habeas Corpus Review of State-Court Decisions

§ 206.05 Discretionary Determinations Reviewed for Abuse

[1] Abuse of Discretion by Trial Court

Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984): “when we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the district court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. An abuse of discretion, on the other hand, can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.”

[2] Abuse of Discretion by Administrative Agency

Administrative Procedure Act, 5 U.S.C. 706 (Moore’s paraphrase): an agency decision, to the extent that it is reviewable, may be set aside only if it is arbitrary, capricious, an abuse of discretion, not in accordance with law, unconstitutional, in excess of agency authority, unsupported by substantial evidence after a hearing on the record, or unwarranted by facts that are subject to trial de novo by a reviewing court. It remains the reviewing court's role ultimately to determine questions of law, interpretations of constitutionality, and the meaning and applicability of agency action.

§ 206.06 Review for Plain Error in criminal cases

[1] Rule and Its Rationale F.R.Crim.P. 52(b) “A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.”

[2] Standard of Review United States v. Olano, 507 U.S. 725, 733-36 (1993); Chapman v. California, 386 U.S. 18, 21 (1967); Kotteakos v. United States, 328 U.S. 750, 760 (1946).

United States v. Pirani, 406 F.3d 543, 550 (8th Cir. 2005) (en banc): “Plain error review is governed by the four-part test of Olano, 507 U.S. at 732-36, 113 S.Ct. 1770, as articulated in Johnson, 520 U.S. at 466-67, 117 S.Ct. 1544:

> before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The defendant has the burden of proving plain error, whereas the government has the burden of proving harmless error. Olano, 507 U.S. at 734-35, 113 S.Ct. 1770. "Appellate review under the plain-error doctrine, of course, is circumscribed and we exercise our power under Rule 52(b) sparingly." Jones v. United States, 527 U.S. 373, 389, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999)."

§ 206.07 Review for Harmless Error

[1] Rule and Its Rationale F.R.Crim.P. 52(a) "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

F.R.Civ.P. 61 "Unless justice requires otherwise, no error in admitting or excluding evidence--or any other error by the court or a party--is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."

F.R.Evid. 103(a) "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

28 U.S.C. 2111 "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

[2] Standard of Review

[3] Fundamentally Harmful Errors Arizona v. Fulminante, 499 U.S. 279, 309 (1991): "structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards"

Neder v. United States, 527 U.S. 1, 8 (1999): "Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction))."

bold-faced outline is from
Moore's Federal Practice – Civil (vol. 19)
George C. Pratt, formerly United States Circuit Judge (2d Cir.)